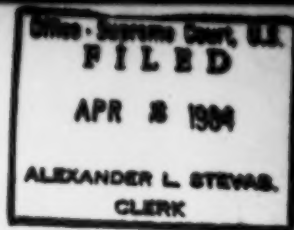


88 - 1626



No. \_\_\_\_\_

**Supreme Court of the United States**

October Term, 1983

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GREGORY LYNN JOHNSON,  
*Petitioner,*

-vs-

THE STATE OF MONTANA,  
*Respondent.*

---

On Writ of Certiorari To The

~~IN THE~~ SUPREME COURT OF THE

STATE OF MONTANA

---

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the totality of circumstances test with respect to a suggestive eye-witness identification should be applied to a suggestive voice identification.
2. Whether, under the circumstances of this case, the Montana Supreme Court properly applied the Neil v. Biggers totality of circumstances test.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	v
GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT MAY BE INVOKED	v
STATEMENT OF THE CASE	1
ARGUMENT	7
I. CERTIORARI IS WARRANTED TO CONSIDER THE QUESTION WHETHER A SUGGESTIVE VOICE IDENTIFICATION PROCEDURE SHOULD BE GOVERNED BY THE SAME STANDARD AS A SUGGES- TIVE EYEWITNESS IDENTIFI- CATION.	7
II. THE MONTANA SUPREME COURT MISAPPLIED THE NEIL V. BIGGERS TEST.	14
CONCLUSION	16
AFFIDAVIT OF SERVICE	17
APPENDICES	
A. Order on Motion to Suppress of District Court, entered May 13, 1983.	A-1
B. Opinion of Montana Supreme Court, decided December 16, 1983.	B-1
C. Order denying Petition for rehearing, Montana Supreme Court, entered February 3, 1984.	C-1

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Gilbert v. California</u> , 388 U.S. 263, (1967)	6, 7
<u>Israel v. Odom</u> , 521 F.2d 1370, 1374 (7th Cir. 1975)	11,
<u>Manson v. Brathwaite</u> , 432 U.S. 98 (1977)	6, 10
<u>Neil v. Biggers</u> , 409 U.S. 199 (1972)	1, 6, 7, 9, 10, 12, 13, 15
<u>Simmons v. United States</u> , 390 U.S. 377 (1968)	8, 9
<u>State v. Pendergrass</u> , 179 Mont. 106, 586 P.2d 691 (1978)	6, 7
<u>Stovall v. Denno</u> , 388 U.S. 293 (1967)	6, 8
<u>United States v. Patton</u> , 721 F.2d 159 (6th Cir. 1983)	10
<u>United States v. Pheaster</u> , 544 F.2d 1370, 1374 (7th Cir. 1975)	11
<u>United States v. Wade</u> , 388 U.S. 218 (1967)	6, 7, 8, 15

STATUTES

28 U.S.C. § 1257 (3)	iv
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TABLE OF AUTHORITIESCASESPAGEMISCELLANEOUS

O'Neill, "The Reliability of the  
Identification of the Human  
Voice, 33 J. Amer. Inst. Crim.  
Law & Criminology, 487, 488 (1943)

11

OPINIONS BELOW

The District Court, Department No. II, Eighteenth Judicial District in and for the County of Gallatin, State of Montana entered its Suppression Order and Opinion on May 13, 1983. The pertinent parts of that opinion are reproduced in the appendix (A-1). The decision of the Montana Supreme Court of December 16, 1983 is not yet reported in the Montana Reporter, but is reported at \_\_\_\_ P.2d \_\_\_\_.

The Order denying reconsideration is unreported, but is reproduced at page C-1 of the appendix.

GROUND'S UPON WHICH THE JURISDICTION  
OF THIS COURT MAY BE INVOKED

This Court's jurisdiction to review this matter is derived from 28 U.S.C. § 1257 (3).

STATEMENT OF THE CASE

Review is sought of the decision of the Montana Supreme Court that the "totality of the circumstances" test for eyewitness identification set forth in Neil v. Biggers, 409 U.S. 199 (1972) applies to voice identification and as to whether the voice identification evidence should be admitted in spite of the fact that procedure was admittedly unduly suggestive. Petitioner, Gregory Lynn Johnson, was charged by the State of Montana with aggravated assault, a felony, and sexual assault, a misdemeanor, on August 31, 1982. On May 13, 1983, the trial court entered an order granting in part Johnson's pre-trial motion to suppress, including the voice identification. A pre-trial appeal was filed by the State regarding that portion of the trial court's order suppressing the voice identification and the Montana Supreme Court reversed the suppression on December 16, 1983. The

Montana Supreme Court denied Johnson's Motion for Reconsideration by Order of February 3, 1984.

The facts show that on the morning of August 23, 1982, a woman realtor of Bozeman, Montana received a phone call from an individual claiming to be named "Frank Bartlett". "Bartlett" requested that the woman show a house listed through her real estate agency and arrangements were made to meet at the house, located in the Story Hills, on the outskirts of Bozeman, Montana, later that morning. (Tr. p. 5). When the woman arrived at the house, a man wearing a ski mask and holding a gun emerged and grabbed her and, after short struggle forced her to the floor. The man tossed the gun into a nearby closet and laid down on top of the woman.

When the assailant was lying on top of the woman, she engaged him in conversation



attempting to talk him into leaving. The assailant, apparently deciding to leave, first placed tape over the woman's eyes and taped her hands behind her. He then dragged her over to a corner of the room and placed her in a sitting position. (Tr. p. 10). He then placed his hand under her bra and touched her breast and then left the house. (Tr. 11, 15). The woman freed herself and reported the assault to the authorities. (Tr. 16).

The woman observed the assailant for a short time before her eyes were taped. She described the mask the assailant was wearing as being quilted with removable parts that attached to the mask with snaps. She described the assailant as being a male approximately five feet six inches tall, wearing a mask, a navy blue hooded sweatshirt, faded blue jeans, and brown shoes. She described his eyes as hazel-colored with long eyelashes and described him with dark

hair with some curl, a smell of garlic on his breath, and a heavy smell of aftershave. She described the assailant's voice as being soft and hesitart and noted that he did not swear when he spoke. (Tr. 12-14). She also generally described to the authorities the assailant's gun and described the hunting knife which was in his possession.

A week after the assault the authorities called the woman and informed her that they had a possible suspect and they wanted her to come and listen to his voice. She went to the Sheriff's Department and was asked to stand near a door to a room which was opened a crack. She listened as the suspect (Gregory Lynn Johnson) was interviewed by the Sheriff's officers. She was not allowed to observe the suspect and did not know his identify. The woman's tape-recorded statement in response to whether she could identify the voice that she heard was:

"Yes, I believe I can identify that voice. That voice, if not the same voice I heard up at Story Hills on the 23rd, it was extremely similar. I would say it was the same voice."

Tr. 21. This statement was made on September 1, 1982, approximately one week after the assault. Much later, at the suppression hearing (January 17, 1983), the woman's testimony was much less equivocal. She testified: "At the time I thought it was identical to the voice I heard in the house." (Tr. 17). On cross-examination, however, she conceded that there was some unsureness in her identification, that she would hate to condemn a person based on that identification, that the circumstances of the assault were distracting thereby affecting her ability to identify the voice, and that she had been made aware of other circumstantial evidence against Johnson between the date of her first statement regarding voice identification and the date of the

suppression hearing, which tended to have a corroboratory effect on her conclusion that the voice she heard was that of her assailant. (Tr. 17-23).

The trial court, relying on the rationale of Neil v. Biggers, *supra*, applied the Montana case, State v. Pendergrass, 179 Mont. 106, 586 P.2d 691 (1978), and found the voice identification unduly suggestive and suppressed it. In its suppression, the trial court relied on the "totality of circumstances" test derived by this court in Neil v. Biggers and followed in the "Wade trilogy" (See U.S. v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967); See also Manson v. Brathwaite, 432 U.S. 98 (1977)).

The Montana Supreme Court reversed. Although conceding that the voice identification was unduly suggestive, and although

not sanctioning the voice identification procedure, the Montana Supreme Court concluded that the voice identification procedure met the totality of circumstances test of Neil v. Biggers, supra, and State v. Pendergrass, supra. The suppression of the voice identification was reversed and the case remanded for trial. The trial has been deferred pending resolution of the present Petition.

#### ARGUMENT

- I. CERTIORARI IS WARRANTED TO CONSIDER THE QUESTION WHETHER A SUGGESTIVE VOICE IDENTIFICATION PROCEDURE SHOULD BE GOVERNED BY THE SAME STANDARD AS A SUGGESTIVE EYE-WITNESS IDENTIFICATION.

The inherent unreliability of eye-witness identification, long a matter of concern for this court, was addressed in a group of cases known as the Wade trilogy. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967);

Stovall v. Denno, 388 U.S. 293 (1967). The Wade trilogy established a per se rule that excluded evidence of an identification obtained through unnecessarily suggestive procedures, when a fairer alternative was available.<sup>1/</sup> The Court in Stovall v. Denno, however, found an exigent circumstance exception, allowing evidence from a one-on-one confrontation because the witness was in danger of death. *Id.*

The Stovall approach was refined in subsequent cases. In Simmons v. United States, 390 U.S. 377 (1968), this Court held that each case must be considered on its own facts and that a pretrial identification will be

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<sup>1/</sup> The Wade trilogy rule was prospective in application, and affected only confrontations conducted after July 12, 1967, the date on which the cases were decided. See, Stovall v. Denno, 388 U.S. at 300, 301.

set aside only if the "procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons, 390 U.S. at 384. Neil v. Biggers, 409 U.S. 188 (1972), held that the Simmons test, with the deletion of the "irreparable" requirement, served as the standard for the admissibility of testimony concerning an out-of-court identification. Neil, 409 U.S. at 198. Certain criteria were to be considered in determining whether the likelihood of misidentification exists:

We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.



Neil, 409 U.S. at 199. See also Manson v. Brathwaite, 432 U.S. 98 (1977).

While a few of these cases involve aspects of voice identification<sup>2/</sup>, they were essentially eyewitness identification cases. This counsel has found no cases in which this Court has applied Neil v. Biggers rationale to a case which involves strictly a suggestive voice identification procedure as opposed to a suggestive eyewitness identification procedure. In speaking of the Neil v. Biggers test with respect to a voice identification question, the Sixth Circuit said in United States v. Patton, 721 F.2d 159, (6th Cir. 1983) that: "Although this test was developed with respect to visual identification, the same principles apply

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<sup>2/</sup> Neil v. Biggers, for example, involved voice identification as well as eyewitness identification, but was primarily an eyewitness identification case.



with full force to aural identification."

(Citing U.S. v. Pheaster, 544 F.2d 353, 369 [9th Cir. 1976], cert. den'd., 429 U.S. 1099 [1977]; Israel v. Odom, 521 F.2d 1370, 1374 [7th Cir. 1975]).

This holding is questionable in light of the inherent differences between voice identification and eyewitness identification. The ability of most persons to recognize a human voice has been seriously questioned. Citing an experiment conducted under laboratory conditions with the sampling of 740 listeners, one commentator notes that a person's ability to recognize a voice decreases with the passage of time.

Over 88% of the auditors recognized an unfamiliar voice within a day or two of first hearing. After three months, only 35% recognized an unfamiliar voice, while only 18% were able to do so after five months.

O'Neill, "The Reliability of the Identification of the Human Voice," 33 J. Amer. Inst. Crim. Law & Criminology, 487, 488 (1943). Here the

voice identification made by the victim was approximately one week after the assault. Since the assailant was wearing a ski mask there was very little in the way of eye-witness identification that the witness could make. Moreover, the pre-trial show up identification procedure involved only identification of the voice. The victim was not allowed to observe Johnson and she did not make a pre-trial eyewitness identification.

In addition, the five-part test developed in Neil v. Biggers to assess the totality of circumstances is not readily adaptable to a voice identification procedure. For example, the criteria relating to the "opportunity of the witness to view the criminal at the time of the crime" (emphasis added) and the "accuracy of the witness' prior description of the criminal" relate largely to eyewitness identification, not voice identification.

The Neil v. Biggers test is simply inappropriate for a case which is limited to

voice identification because of the inherent unreliability of voice identification, Petitioner contends that this Court should apply the previous Wade standard to a suggestive identification procedures. Because of the substantial likelihood of irreparable damage done through voice identification and because of the unreliability of voice identification, a voice identification which has been elicited through an unduly suggestive procedure should be excluded from the trial.

Even if this Court refuses to adopt such a per se rule, it should adopt a rule that calls for stricter scrutiny than that evident in the Neil v. Biggers totality of circumstances test.

Accordingly, certiorari is warranted under Rule 17(c) of the Rules of this Court to decide an important question of federal law which has not been, but should be, settled by this Court.

II. THE MONTANA SUPREME COURT MIS-  
APPLIED THE NEIL V. BIGGERS  
TEST.

The Montana Supreme Court held that, under the totality of circumstances test enunciated in Neil v. Biggers, the suppression of the voice identification by the trial judge was erroneous. This holding misapplied the Neil v. Biggers test. The victim's voice identification was somewhat unsure at the time of the initial show up, one week after the assault. Later, at the suppression hearing, the victim's identification seemed less equivocal. Her cross-examination, however, indicates a great deal of unsureness regarding the voice identification. For example, she testified as

follows:

Q: When you said you believed you could identify the voice, that indicates some bit of unsureness at that time, doesn't it?

A: (Victim) Well, you know, you hate to say, you hate to, if somebody is possibly a suspect, you hate to--- hate to personally....I believe it was the same voice, but I would hate to say. There is a lot of voices that are similar and I believe that's the same voice, if not the same. I guess that's all I can say about it. I would hate to condemn somebody unfairly, but to me that was the voice I heard.

Q: In other words, if there were no other evidence in this case then the, and the voice was all the evidence that the state had, you would not feel comfortable pointing your finger at that particular person, would you?

A: (Victim) You are right. I couldn't feel comfortable doing that.

Tr. 21, 22. (Emphasis added).

By the time of the trial, however, the damage to defendant from the tentative voice identification will be irreparable because of the reluctance of the witness to go back on her word. This Court has on several occasions

noted the propensity of witnesses to rationalize initial unsure identification so that by the time of the trial they will not likely go back on their word. See U.S. v. Wade, supra, (1967). That case points out that the misidentification will have become "irreparable" under the circumstances and cross-examination is really not very effective in undoing the damage.

This unsureness in the identification, coupled with the ill-suited application of several other factors of the eyewitness Neil v. Biggers test (such as opportunity of the witness to "view" the suspect) render the suggestive voice identification procedure in this case fatally defective and violative of defendant's due process rights.

#### CONCLUSION

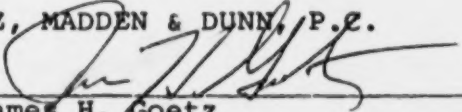
For the foregoing reasons, Petitioner respectfully submits that the Writ of

Certiorari should be granted to consider the questions presented.

DATED This 2nd day of April, 1984.

GOETZ, MADDEN & DUNN, P.C.

By

  
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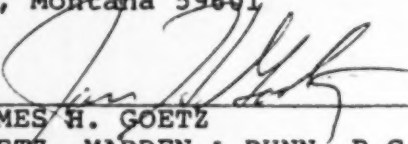
AFFIDAVIT OF SERVICE

STATE OF MONTANA        )  
                                  : ss.  
County of Gallatin     )

James H. Goetz being duly sworn upon oath deposes and says: That I have served the foregoing "Petition of Certiorari" upon all parties by causing three (3) copies thereof to be sent by first class U.S. mail, postage prepaid, on April 2, 1984, to the following:

THOMAS ANACKER  
Gallatin County Attorney's Office  
615 South 16th  
Bozeman, Montana 59715

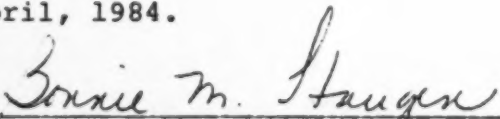
MICHAEL GREELY  
Attorney General  
State of Montana  
Capitol Building  
Helena, Montana 59601



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Attorneys at Law  
35 North Grand Avenue  
Bozeman, Montana 59715  
(406) 587-0618

SUBSCRIBED AND SWORN To before me this  
2nd day of April, 1984.



---

BONNIE M. HAUGEN  
NOTARY PUBLIC For the State of  
Montana; Residing at Bozeman,  
Montana; My Commission expires  
10/2/85



★ ★

Defendant.

[illegible]

No. DC-82-124-A

## ORDER ON MOTION TO SUPPRESS

Appeal from the Supreme Court of the  
State of Montana.

Joseph B. Gary, District Judge of the Eighteenth  
Judicial District of the State of Montana, In  
And For the County of Gallatin

Decided: May 13, 1983

GARY, District Judge:

In the above captioned case, counsel for the Defendant has moved to suppress evidence and exclude the same from admission at the trial. The motion was three-fold in that the counsel moved to; one, suppress all evidence seized at the vehicle and/or home of the Defendant by a search issued as a result of an issuance of a search warrant; two, the voice identification of the victim; three, all identification made by the witness or reference to the hunting knife of the Defendant and to the cologne or aftershave lotion seized at the Defendant's home. Said matter was fully argued and testimony was submitted and briefed and memorandums supplied by both counsel for the State and counsel for the Defendant and after examination of the record, the application for search warrant, and the search warrant itself, the findings of this Court are as follows:

1. The following evidence obtained by the sheriff's officers from the vehicle and/or residence of the Defendant as a result of the search warrant, is admitted, to-wit;

a. all articles listed on the return of the search warrant with the exception of item 14, one western hunting knife with sheath, item 15, one 400 c. gold knife with wood handle, and item 17, one faded light pink bath towel.

2. On the question of the voice identification made by the victim of the alleged assault and any testimony referring to the voice identification which is the subject of the motion to suppress; said motion to suppress is granted.

3. On the question of the identification made by the witness or reference made thereto of the hunting knife of the Defendant, the motion to suppress is granted. As to the cologne or aftershave

lotion seized at the Defendant's home, the motion is denied.

DATED this 13th day of May, 1983.

/s/ Joseph B. Gary  
JOSEPH B. GARY  
DISTRICT JUDGE

MEMORANDUM

I.

QUESTION: WHETHER A SEARCH WARRANT CONTAINS SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE THAT THE ITEMS TO BE SEIZED WOULD BE FOUND IN THE PLACES AUTHORIZED TO BE SEARCHED?

(Text [pp. 2-10] deleted because not pertinent to the present Petition for Certiorari.)

II.

QUESTION: WHETHER THE VOICE IDENTIFICATION IS ADMISSIBLE.

In this particular case, the Court has gone through the soul searching that troubled Judge Bennett in State v. Pendergrass, Mont.

\_\_\_\_\_, 586 P.2d 691. Only one person was made available for the complaining witness to attempt to identify. The person made available was the suspect and the complaining witness was advised prior to listening to the suspect that he was the suspect. Immediately, the identification must be looked upon with skepticism because this procedure could be impermissibly suggestive and produce a substantial likelihood of irreparable misidentification, as was the case in State v. Pendergrass, supra.

The Montana Supreme Court in State v. Pendergrass adopted the totality of circumstances test that was set forth in Manson v. Brathwaite, 432 US 98, (1977) and established the five criteria that should be considered by a trial court or an appellate court in determining whether or not the offered testimony should be excluded upon the grounds that there is a substantial

likelihood of irreparable misidentification.

These grounds are:

1. Opportunity of the witness to view the criminal at the time of the crime;
2. The witness's degree of attention;
3. The accuracy of the prior description;
4. The level of certainty demonstrated at the confrontation; and
5. The time between the crime and the confrontation.

In this particular case, the elements may exist that were missing in the State v. Pendergrass, and this situation may come within the criteria established by the Court. A step-by-step application of the Manson criteria adopted in Pendergrass to this case is necessary before discussing the second aspect of the voice identification, that is the conduct of the officers. The first step in Pendergrass is the opportunity of the witness to view the assailant at the time of the crime. The witness did not

directly view her assailant's face because of the mask, but under the circumstances she viewed his physical appearance quite well and gave an accurate description of it. She spent approximately one-half hour with the assailant in which she stated she made every effort to identify him and describe his clothing. She stated that he was wearing brown scuffed shoes, a blue sweat-shirt, a quilted face mask with snaps on it, and blue jeans. That he had dark hair, strong garlic-like breath, a heavy after-shave smell, and that he was of medium height. She testified that she was about 5'6" with heels on and that he was approximately the same height when they were standing. She also described his sculptured dark hair and his soft, hesitating voice.

The above facts also meet the criteria established in steps two and three of Pendergrass, that is the witness's degree

of attention and the accuracy of the prior description. Clearly, she was paying close attention to the assailant to describe him as she did and the description was quite accurate. This is understandable in light of the fact that the assailant laid on top of the witness for approximately one-half hour after they had scuffled over the gun and the knife. She also talked with him constantly during this time in an attempt to dissuade him from attacking her with either the knife or the gun.

The fourth step in Pendergrass is the level of certainty demonstrated when the victim identifies the voice. As she testified on the stand, she would not want to see the Defendant convicted on voice identification alone; however, she was positive that the voice identified was the same voice as the attacker. It is important that she described the voice as a soft and hesitating one, and that when asked to identify it, she



said that it was the voice of the assailant. However, the fourth step is questionable because of the following statement from Pendergrass at 697.

A. The level of certainty demonstrated at the confrontation. Rather than making an unequivocal statement at that time she made the identification, the response of the witness here was qualified. "I think that's the voice" or "That sounds like the voice".

The last step in Pendergrass is the time between the crime and the confrontation. The crime took place on August 23, 1982, and the voice identification on August 30, 1982, one week later. Therefore, because of the short time span between the two events, this fifth criteria is met.

Clearly, the victim in this case did all she could to identify the voice and this Court feels it was a commendable effort considering the circumstances. Unfortunately, her efforts to identify the voice are to no avail because of the manner of conduct of

the the voice identification procedure. In Pendergrass at 695 and 696, the Montana Supreme Court stated that the United States Supreme Court:

"...established a rule that evidence of an identification obtained through unnecessary suggestive procedures when a fairer alternative was available, must be excluded per se. Unless these are exigent circumstances (as in Stovall, where the witness was in danger of death), due process requires that identification procedures be conducted in such a manner as to eliminate as nearly as possible any suggestion in the confrontation that one individual is intended to be picked out.

"subsequent cases, however, have not strictly applied the standards expressed in Wade and its companion cases, but rather have adopted a more lenient 'totality of the circumstances' approach. Under this approach the admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." Neil v. Biggers, 409 US 188, (1972)

The Montana Supreme Court in Pendergrass went on to say that they were reversing the District Court because the voice identification was admitted. The Court stated that,

"...the reliability of the identification from the defendant's voice alone is considerably more suspect, and the due process inadequacies in the procedure are considerably more blatant. There appear to be no exigent circumstances which preclude the use of a number of individual's voices for the witness to select from, rather than just focusing her attention on a single suspect. Pendergrass, at 696.

In this case, the Court finds no exigent circumstances which precluded the police from using a number of individual's voices for the victim from which to select. As in Pendergrass, the detectives here gave the victim only one voice to listen to and identify. By giving her only one voice to listen to, she obviously focused her attention on a single suspect and therefore had no real choice. This makes the due process inadequacies in the voice identification procedure considerably more questionable. Therefore, this case fits the criteria of the above quote from Pendergrass.

the suggestiveness of the voice identification procedure against the

due process criteria, this Court finds that the voice identification violates the rule in Pendergrass, and was therefore unduly suggestive and therefore admissible. When the defendant was interviewed by the Sheriff's Office on August 30, 1983, Mrs. Jennings was in an adjacent room, and without seeing the defendant and only listening to his voice, she stated that the voice was that of her assailant. This Court struggled long and hard with this decision because the Court feels that Mrs. Jennings did all she could do to identify the voice. It is disappointing to this Court to exclude the voice identification as evidence from the trial, but this Court is bound by Pendergrass and finds that there "...appear to be no exigent circumstances which precluded the use of a number of individual's voices for the witness to select from rather than just focusing her attention on a single suspect."

A-13

DATED This 13th day of May, 1983.

/s/ Joseph B. Gary

JOSEPH B. GARY

DISTRICT JUDGE

UNI' IN THE SUPREME COURT OF THE S  
STATE OF MONTANA

★ ★ ★ ★ ★

STATE OF MONTANA, )  
 )  
 Plaintiff and Appellant, ) No. 83-296  
 )  
 -vs- ) No. DC-82-124-A  
 )  
 GREGORY LYNN JOHNSON, )  
 ) OPINION  
 Defendant and Respondent. )  
 )  
 ----- )

Decided: December 16, 1983

GULBRANDSON, L.C., Justice

This cause comes on appeal from an order of the District Court of the Eighteenth Judicial District in Bozeman, Montana, granting part of defendant's motion to suppress evidence.

The alleged facts in this case indicate the following. On the morning of August 23, 1982, the victim, a Bozeman realtor, received a phone call from an individual claiming to be a Frank Bartlett. The caller requested that the victim show him a house that was listed through her real estate agency. Arrangements were made to meet at the house later that morning.

The victim arrived just before 11:00 a.m. She entered the house to make sure everything was in order before the prospective buyer arrived. When she entered the master bedroom, a man wearing a ski mask and holding a gun jumped out and grabbed her. She grabbed the barrel of the gun and

pushed it away from her. A struggle ensued.

The assailant overpowered the victim and threw her to the floor. He threw the gun into a nearby closet and laid down on top of her. The assailant pulled out a hunting knife and tried to remove a strip of tape from its blade to cover the victim's eyes. She began to struggle again and grabbed at the knife, cutting her hand.

The struggling ceased and the assailant was again lying on top of the victim. The assailant then placed tape over the victim's mouth and taped her hands behind her back. He then pulled her over to a corner of the room, placed her in a sitting position and reached inside her clothing touching her breast. The assailant then left.

The victim freed herself and reported the assault to the Gallatin County Sheriff. She gave the Sheriff's office a description of the assailant's voice and general appearance.



On September 1, 1982, approximately one week after the assault, the Sheriff's office informed the victim that they had a suspect and wanted her to come in and listen to his voice. The victim went to the Sheriff's office and was asked to stand near a door that was slightly opened. She listened for approximately five minutes as the suspect talked with Sheriff's officers. She could not see the suspect. When asked if she could identify the voice, she stated,

"Yes, I believe I can identify that voice. That voice, if not the same voice I heard up at Story Hills on the 23rd, it was extremely similar. I would say it was the same voice."

The victim stated she talked with the assailant for approximately thirty minutes when the assault occurred. The suspect was placed under arrest following the voice identification.

On May 13, 1983, the District Court granted the defendant's motion to suppress

the voice identification as evidence at trial. The District Court relied upon our decision in State v. Pendergrass (1978), 179 Mont. 106, 586 P.2d 691, in making its ruling.

The State now appeals claiming the District Court erred in granting defendant's motion to suppress the voice identification.

The reliability of procedures used in eyewitness identification was addressed by the United States Supreme Court in a group of cases known as the Wade trilogy. United States v. Wade (1967), 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; Gilbert v. California (1967), 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178; Stovall v. Denno (1967), 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199. The Wade trilogy established a per se rule that excluded all evidence of an identification obtained through unnecessarily suggestive procedures when a fairer alternative was available. Thus, the court in Stovall

said:

"The practice of showing suspects singly to persons for the purposes of identification, and not as part of a lineup, has been widely condemned. [footnote omitted]. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . ."

Stovall, 3-8 U.S. 302. In Stovall, the court found an exigent circumstance exception to the per se rule when they approved an identification made after a one-on-one confrontation because the witness was in danger of death.

Subsequent cases have not strictly applied the standards expressed in the Wade trilogy, but have adopted a more lenient totality of the circumstances approach. Under this approach, the admission of testimony concerning an unnecessarily suggestive identification procedure does not violate due process standards so long as the identification

possesses sufficient aspects of reliability.

Neil v. Biggers (1972), 409 U.S. 188, 93

S.Ct. 375, 34 L.Ed.2d 401. In Biggers,

the court identified certain criteria to

be considered in determining whether the

likelihood of misidentification exists:

"We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Biggers, 409 U.S. at 199.

The Biggers rationale was adopted by the Court in Manson v. Brathwaite (1977), 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140.

In Manson, the Court examined the two post-

Biggers approaches taken by lower courts regarding evidence obtained through suggestive identification procedures:

"The first, or per se approach . . . focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whether it has been obtained through unnecessarily suggested confrontation procedures. (foot-note omitted)

" . . .

"The second, or more lenient, approach is one that continues to rely on the totality of the circumstances. It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability."

Manson, 432 U.S. at 110.

The Manson Court rejected the per se rule stating, "[t]he per se rule . . . goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant." The

Manson Court added that "reliability is the linchpin" in determining admissibility for both pre- and post-Stovall confrontations. The Manson Court concluded that the factors set out in Biggers are to be applied, "and against these factors is to be weighed the corrupting effect of the suggestive identification itself." Manson, 432 U.S. at 114.

In State v. Pendergrass (1978), 179 Mont. 106, 586 P.2d 691, we applied the Biggers-Manson test to a voice identification procedure. In Pendergrass, the defendant was accused of committing a rape at a Helena grocery store. Thirty-two hours after the incident occurred, the victim of the assault was asked to come to the police station. She was told that a suspect in the crime was going to be questioned, and was given an opportunity to listen to the conversation. The defendant and an officer

were on one side of a room divided, floor-to-ceiling, by filing cabinets with the victim stationed on the other side. The officer interrogated the suspect as to his activities on the night in question. The suspect was not asked to repeat any phrases the victim had said her assailant used. When the victim was asked her opinion of the defendant's voice, she replied either "I think that is the voice" or "I believe that is the voice." We concluded that the totality of the circumstances surrounding the voice identification gave rise to a very substantial likelihood of irreparable misidentification and due process required exclusion of the evidence. In reaching that conclusion, we used a step-by-step application of the Biggers-Manson criteria.

By applying the five-step Biggers-Manson test, as adopted in Pendergrass, to the facts

of this case, we conclude that the District Court erred in its decision.

Specifically, the five factors provide:

(1) Opportunity of the witness to view the criminal at the time of the crime. Here, as in Pendergrass, the victim did not see the assailant's face. However, in Pendergrass the victim made conscious effort not to see her assailant while the victim, in the present case, gave a detailed description of his overall appearance. In particular, the victim viewed her assailant for approximately twenty minutes before her eyes were taped and described him as male, approximately 5'6" in height, wearing brown scratched shoes, blue jeans, blue hooded sweatshirt, dark curly hair, hazel eyes with long eyelashes, strong garlic smell on his breath, a heavy smell of aftershave and a soft, hesitating voice. These facts indicate the first step of the Pendergrass test was satisfied.



(2) The witness' degree of attention.

Clearly the victim was paying close attention to the assailant to describe him as she did. Indeed, the assailant laid on top of the victim for approximately thirty minutes after they had scuffled over the gun and knife. In addition, at the suppression hearing, the victim testified she was paying close attention to the voice. Thus, the second step of the Pendergrass test was satisfied.

(3) The accuracy of the prior description. The previous discussion indicates the witness gave a detailed description of her assailant. The description was much more full and complete than the description given by the victim in Pendergrass and the District Court properly determined that the third step was satisfied.

(4) The witness' level of certainty at the confrontation. As previously noted, when the victim in this case was asked if she could identify the voice of the defendant

at the initial confrontation she stated:

"Yes, I believe I can identify that voice. That voice, if not the same voice I heard up at Story Hills on the 23rd, it was extremely similar. I would say it was the same voice."  
(emphasis added)

At the suppression hearing, the victim gave the following testimony on direct examination:

"Q. And could you identify this voice?

"A. At the time I thought it was identical to the voice I heard in the house.

"Q. And this was approximately one week after?

"A. One week after.

"Q. You've testified that you conversed with the assailant for approximately a half hour, is that correct?

"A. Yes, I talked constantly the whole time, and he talked back to me. He never told me to shut up.

"Q. And how close to this individual were you during these conversation?

"A. If it wasn't face to face, he was, it was always a very close proximity.

"Q. And during these conversations, were you paying attention to this voice?

"A. Yes.

"Q. Were there any distractions?

"A. No, well just the gun and the knife.

"Q. But other than that--

"A. No, no distraction. It was absolutely silent except for the two people talking, the two of us."

Upon cross examination the victim stated:

"Q. Well, you are completely sure that that was the voice you heard.

"A. At that time I was."

The victim also said the following on cross examination:

"Q. And you were not at that time, that is during the assault, focusing on a voice. You were concerned about protecting yourself and your welfare and getting rid of the person.

"A. That's true, but it got to the point where when he was laying on top of me for it seemed like an eternity, we talked during that time, and his voice was like right here and we-- I at that point, I think I'm an astute observer. I listened and we conversed; and at that point there were less distractions other than the entire incident.

"Q. But you were not focusing at that time or any other time on his voice specifically?

"A. I was focusing on getting out of there alive."

The District Court held that the victim made the type of equivocal voice identification that we held was inadmissible on due process grounds in Pendergrass. In Pendergrass, we said:

"Rather than making an unequivocal statement at the time she made the identification, the response of the witness here was a qualified 'I think that's the voice' or 'That sounds like the voice.'"

Pendergrass, 179 Mont. at 117.

However, the statement of the victim in Pendergrass was more equivocal than the statement of the victim in this case. Rather than say "I think" or "I believe that's the voice," here the victim said she could identify the voice and added "I would say it was the same voice." This was an unequivocal voice identification that should not have been suppressed by the

District Court. Moreover, the fact that the assailant was lying on top of the victim for approximately twenty minutes as he was speaking, makes the victim's voice identification even more reliable than the identification in Pendergrass. Thus, the fourth step of the Biggers-Manson test was satisfied and the voice identification should not have been suppressed because of the victim's uncertainty.

(5) The time between the crime and the confrontation. In Pendergrass, thirty two hours elapsed between the crime and the confrontation. In the present case, approximately one week elapsed between the assault and the confrontation. We agree with the District Court that seven days between the assault and the confrontation should not render the identification inadmissible. Indeed, in State v. Dahl (Mont. 1980), 620 P.2d 361, 37 St.Rep. 1852, we held that an eight-day delay between the

time of the crime and the confrontation was permissible.

In short, the application of the Biggers-Manson criteria as adopted in Pendergrass, to the facts of this case, indicate sufficient indicia of reliability to allow the voice identification into evidence. However, our decision does not stand for the proposition that the identification procedure used by the police in this case was ideal. Clearly a "voice line-up," in which the victim must make an identification after listening to several voices, is the most reliable procedure. Nevertheless, our analysis of the totality of the circumstances in this case convince us that the victim's voice identification was sufficient, and the District Court erred in its ruling.

We therefore reverse and remand in accordance with our decision.

/s/ L.C. Gulbrandson

We concur:

/s/ Fred J. Weber

/s/ John C. Sheehy

/s/ Frank Morrison  
Justices

Mr. Justice Daniel J. Shea, dissenting:

I dissent. The one-person voice line-up was unduly suggestive and I would hold the voice identification to be inadmissible.

/s/ Daniel J. Shea  
Justice

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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STATE OF MONTANA,	)	
	)	
Plaintiff and Appellant,	)	No. 83-296
	)	
-vs-	)	No. DC-82-124-A
	)	
GREGORY LYNN JOHNSON,	)	ORDER
	)	
Defendant and Respondent.	)	
-----	)	

Appeal from the Supreme Court of the  
State of Montana.

PER CURIAM:

The petition for rehearing is denied.

DATED This 3rd day of February, 1984.

/s/ Frank I. Haswell  
Chief Justice

/s/ John Conway Harrison

/s/ John C. Sheehy

/s/ L.C. Gulbrandson  
Justices

Mr. Justice Daniel J. Shea and Frank B.  
Morrison Jr. would grant the petition.